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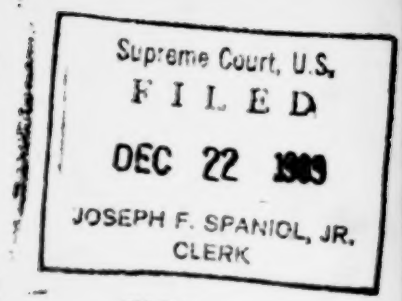

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ANNY NEWMAN

V.

DIANA BURGIN, RICHARD M. FREELAND,
ROBERT A. GREENE and ROBERT CORRIGAN,
INDIVIDUALLY AND IN THEIR CAPACITIES
AS OFFICERS OF THE
UNIVERSITY OF MASSACHUSETTS, BOSTON

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
FIRST CIRCUIT

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QUESTIONS PRESENTED

Even though there were disputed issues of fact material to the sanctions invoked against this tenured state university professor for plagiarism, the lower court held that the university officials were entitled to summary judgment on their qualified immunity defense.

1. Can the "objective legal reasonableness" standard for officials' qualified immunity be legally established just because the situation confronting them was disputed or essential facts uncertain?

2. When a jury could infer that these officials had a pre-ordained intent to sanction this petitioner, did that ultimate disputed fact foreclose ruling on summary judgment whether the officials reasonably could know if they were being "arbitrary and capricious" (which the court held was the clearly established legal standard)?

LIST OF PARTIES

The Court may note that the lower court caption lists the Commonwealth of Massachusetts as a defendant-appellee in that court, but that is an error. The caption of the case in this Court contains the names of all parties. Rule 21.2(b).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Anny Newman, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals For for the First Circuit, originally entered on August 28, 1989, on which a duly filed Petition For In Banc Consideration Or Rehearing was then denied on September 25, 1989.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 884 F.2d 19 (1st Cir. 1989), the decision of the United States District Court for the District of Massachusetts was not reported, but copies of both opinions appear in the "separately presented" Appendix hereto.[1]

JURISDICTION

The United States Court of Appeals for the First Circuit denied petitioner's timely-filed Petition For In Banc Consideration Or Rehearing on September 25, 1989 (App. 27), so this petition is timely filed, in accordance with the provisions of Rule 20.2 and .4. The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

CONSTITUTIONAL PROVISION AND STATUTE

Section 1 of Amendment XIV to the Constitution of the United States of America, 14 Stat. 358 and 15 Stat. 705-707, and 42 U.S.C. §1983, are set out in the Appendix, page 29.

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1 Because the opinions are relatively "voluminous", they are "separately presented" in the Appendix hereto filed herewith, as per Rule 21.1(k), and the Appendix will be hereinafter cited as "App. ___."

STATEMENT OF THE CASE

The plaintiff, an internationally respected scholar and a tenured member of the Russian Department of the University of Massachusetts, was publicly censured and denied certain academic privileges because of supposed plagiarism in an article of hers about a 17th-century Serbo-Croatian poem. She brought this action in the United States District Court for the District of Massachusetts in 1986 against several of the persons involved in that administrative university decision, alleging violations of her substantive and procedural due process rights under both the federal and state civil rights laws. See 42 U.S.C. §1983; Mass. Gen. Laws Ann. ch. 12, §11 I.

It all began during a routine meeting of the Russian Department Personnel Committee's annual review of another professor. The defendant, Burgin, who was then the Chairman of the Russian Department, was not a member of the Personnel Committee but was, inappropriately, present. There was a long history of Burgin's personal animosity toward the plaintiff--such that it was "part of the folklore of the institution", as the Dean, the defendant, Richard M. Freeland, admitted at a deposition. Suddenly, with no prior notice to the plaintiff that it would arise,

a member of the Committee told the plaintiff that it had been brought to his attention by his friend, Burgin, that the plaintiff had apparently plagiarized in a recent article of hers from a prior German text by one Setschkareff.[2] The plaintiff told the Committee that that was nonsense, explaining (something Burgin and the Committee until then had not known) that her article was but a revision of her Harvard master's thesis from twenty years before; that the world-renowned authority who was her thesis advisor then had assigned the Setschkareff text to use as a source and model for the thesis; that she had worked with Setschkareff himself in preparation of the thesis, as he was her Harvard professor of Russian literature at the time; and that her expert advisor highly praised her thesis, considering it of such merit that it was cataloged in Harvard's Widener Library where it had been available for the use of scholars for twenty years--all with no one, least of all the author supposedly plagiarized, ever raising any question of plagiarism. The Committee said they

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2 Only one member of the Committee could read German, not including Burgin, and no one on the Committee read Serbo-Croat (the language of the poem that was the subject of the article and the relevant parts of the German test) or knew anything about the field of scholarship.

would await a written response from the plaintiff before taking any action.

But the Committee did not wait, they reported orally the accusation of plagiarism to the defendant, Dean Freeland. He invited the plaintiff to submit a detailed written Refutation of the charge, which she did. It contained the details of the article being but a revision of her thesis, now that she had a better command of English, described the context--the scholarly imprimatur the thesis had received, constituting fair and authorized use of Setschkareff's test--and she detailed and explained the scholarly Serbo-Croat reasons for the apparent linguistic similarities, all refuting the charge of plagiarism. Dean Freeland decided that he would ignore applicable university regulations specifying several required protections as preliminaries to any action on his part, and would submit only plaintiff's article and parts of the Setschkareff text to two outside academics he had selected and ask them if there was plagiarism, but he refused to send them plaintiff's written Refutation. Plaintiff specifically objected to both of the Dean's procedures, pointing out that there was no fair reason to make this charge the only exception to established university procedures (the

utilization of which could obviate any action by him), and that it was patently unfair to keep her Refutation secret from the two scholars, because the context was necessary fairly to assess if this was plagiarism at all, wherein intent is a vital element.[3]

Dean Freeland admitted that the resolution of the plagiarism charge was a "major personnel action", as it entailed potential dismissal, and the university regulations (the, so-called, "Red Book") applied to "major personnel actions", such as appointment or tenure, but Dean Freeland refused to apply the usual "Red Book" procedures to plaintiff's case.[4] Three of those procedures would have afforded the plaintiff meaningful protections at the critical early stages of administering this charge (what Freeland admitted was "the most serious of academic offenses"):

> 1. she was entitled to have been notified by the Department Chairman that the charge of plagiarism was going to be made at the faculty level and the prospective report of the charge to the Dean;

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3 It was essentially admitted in the course of discovery that intent is accepted as a definitional element of plagiarism, that there must be an "intent to deceive."

4 When pressed about this anomaly during his deposition, he pointed out that a plagiarism charge was not specified in the "Red Book", like "appointment, reappointment, promotion and tenure", so he regarded the usual "Red Book" procedures as "irrelevant", "immaterial" to this matter.

> 2. she was entitled to have included in her file transmitted to the Dean and used in the determinative procedures any and all materials which she believed would be essential to an adequate consideration of her case; and
>
> 3. she was entitled to be informed of the prospective Department recommendation to the Dean.

All of these protections were ignored, the defendant Greene, the Provost of the university, even admitting that he knew of no other case of a scholarship matter wherein the Dean was afforded such sparse documentation.

Dean Freeland gave the plaintiff the written assurance that "[his] continuing goal...[was] to assure that the procedures followed in this matter at every step are entirely in accord with fundamental principles of fairness and due process for you...." When asked at his deposition why he had not therefore supplied the two outside scholars with the plaintiff's detailed Refutation of the plagiarism charge, he said he could not have done that "without also making them aware of a number of contextual circumstances which [he] thought would have potentially influenced their professional judgment"!

The plaintiff claimed and the record supported that the defendants also committed subsequent violations of due process

in reaching the ultimate decision that she should be sanctioned. Although no one of them is as substantively and independently effective as these first two, they are summarized because they pertain to plaintiff's comprehensive and most important substantive due process claim:

> having little more to go on then the Personnel Committee oral accusation of plagiarism (Dean Freeland could not read German), it was arbitrary and capricious for him to initiate an administrative investigation of the charge entailing the possible dismissal of a tenured professor or one who could remain, with a shredded reputation;
>
> in violation of established University practices, when outside scholars were necessary to assess a matter of scholarship, the plaintiff was denied any say as to who the outside scholars would be, denied disclosure to them of her identity, and denied their participating as ex officio members of a Department committee to determine the matter of scholarship in issue;
>
> Dean Freeland consulted with Provost Greene throughout the year and a half of administrative procedures in this matter, when Greene would be the higher (appellate level) official to whom Freeland would make any recommendation of sanctions--Freeland admitting that "since [Greene] was involved at every point along the way...it was quite unlikely that he would then change his mind";

> the ad hoc faculty committee constructed to hear the matter exceeded the one issue it was authorized to decide (was there plagiarism here), to find that while the plaintiff had not committed "plagiarism", she had indulged in the transgression (admittedly invented by the committee), of "objective plagiarism" (i.e. unintentional) and exhibited "seriously negligent scholarship", and to reach those conclusions the committee relied upon the opinion of one expert witness and ignored the overwhelming weight of all the other evidence;
>
> Dean Freeland had an ex parte conference with some members of the ad hoc committee after its written decision was handed down, because he "wanted to know why didn't [they] see intentional plagiarism"; and
>
> directly contrary to the ad hoc committee's recommendation to Dean Freeland "that no further action be taken", he recommended broad-ranging severe sanctions to the university administration, which were in due course imposed.[5]

Lastly, the plaintiff claimed that if no one of these actions or inactions constituted in and of itself a denial of procedural or

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[5] Those sanctions included a letter of censure "in the strongest possible terms" "for an act of 'objective plagiarism' and for 'seriously negligent scholarship'" to be sent to everyone in the university concerned with the matter, read to meetings of the Faculty Council and the College Senate, and placed in the plaintiff's "permanent file"; notification of the censure to be sent to Harvard University and the German publishers of plaintiff's article; and denial for five years of any participation by the plaintiff in usual Department affairs except teaching.

substantive due process, in aggregate there is a compelling inference that sanctions against her were "pre-ordained", "pre-determined" by the defendants' various unfair procedures, intended all along, and that such a "railroading" is a definitional example of "arbitrary and capricious" action and, hence, a violation of substantive due process.

After discovery, the defendants moved for summary judgment on the ground of qualified immunity (the only one with remaining relevances), the plaintiff maintained that there were many "genuine issues of material fact" barring such relief, and the District Court denied the motion (App. 1-2).[6] The defendants duly prosecuted an interlocutory appeal of the summary judgment denial, properly restricted by the Court of Appeals to their "qualified immunity" defense, and the Court of Appeals reversed the District Court, holding that because there was "uncertainty" as to whether a reasonable university official reasonably could have known that plaintiff's due process rights

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6 While the District Court's Order is only four sentences long, does not specify the defendants' qualified immunity argument, and mentions only the failure to send plaintiff's Refutation to the outside scholars as a disputed issue, on appeal the parties and the Court of Appeals considered that the qualified immunity defense and all the disputed facts argued had been implicitly determined by the District Court.

were violated by the actions and inactions in this case, these defendants were entitled to summary judgment (App. 3-26). The plaintiff duly filed a Petition For In Banc Consideration Or Rehearing, maintaining that the court had not utilized the correct standard of review and that its decision was contrary to opinions of this Court, other Circuits, and other First Circuit opinions (the arguments essentially now delineated herein as reasons to grant this writ). The Petition was denied on September 25, 1989, "a majority of ["the judges of the court in regular active service"] not having voted to order that the appeal be heard or reheard by the court inbanc" (App. 28). This Petition is now timely filed.

REASONS FOR THE ALLOWANCE OF THE WRIT

Both of the issues presented were constructed by the lower court's erroneous opinion and constitute equally valid reasons to grant this petition. They will be discussed seriatim.

1. When Disputed Issues Of Fact Are Essential To A Court's "Objective Reasonableness" Inquiry, The Defense Of Qualified Immunity Cannot Be Determined On Summary Judgment.

The Court has not yet had to address the question of how courts are to determine, pre-trial, if an official is entitled to qualified immunity under the "objective legal reasonableness" standard of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), when disputed issues of fact are essential to that question of law. Neither in that genesis opinion, nor in the subsequent developmental *Mitchell-Malley-Anderson* trilogy,[7] was the question directly presented--as Justices Stevens, Brennan and Marshall recognized, dissenting in *Anderson v. Creighton*, 483 U.S. 635 (1987) at 655 n. 10: "the possibility that the 'objective reasonableness' of the officer's conduct may depend on the resolution of a factual dispute [and that] [s]uch a dispute may

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7 *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Malley v. Briggs*, 475 U.S. 335 (1986); *Anderson v. Creighton*, 483 U.S. 635 (1987)

preclude the entry of summary judgment...." Here, the lower court ignored disputed facts essential to the "objective legal reasonableness" decision, and this case is an appropriate vehicle for the Court now to make explicit what is implicit in its previous opinions.

In *Harlow*, the Court recognized from the beginning that the "objective reasonableness" inquiry would "permit the resolution of many insubstantial claims on summary judgment", *Id.* at 818--not all. Concurring, Justices Brennan, Marshall and Blackmun specified: "that given this standard, it seems inescapable...that some measure of discovery may sometimes be required to determine exactly what a public-official defendant did 'know' at the time of his actions." *Id.* at 821. In *Anderson v. Creighton, supra*, both the majority and dissenting opinions more specifically recognized that the question of law as to whether the "reasonable officer could have believed the search to be lawful", turned upon "the circumstances with which Anderson was confronted", *Id.* at 640-41; that "the determination whether it was objectively legally reasonable...will often require examination of the information possessed by the searching officials", Id. at 641; "whether the

situation that the officer confronted fits within the ["clearly established"] category." *Id.*, at 651, n. 3. (Emphasis supplied). Justices Stevens, Brennan and Marshall were particularly prescient in their *Anderson* dissent, at 656, n. 12:

> The principle is clearly established ["such as the command of due process or probable cause"], but whether it would brand the official's planned conduct as illegal often cannot be ascertained without reference to facts that may be in dispute.

Here, the lower court proceeded to determine the "objective reasonableness" question of law undeterred by the fact that the "circumstances", "the situation that the officer confronted", was very much a disputed issue of fact. The issue is here nicely focussed. Take the all-important claim that Dean Freeland violated the plaintiff's due process rights by refusing to send her explanatory Refutation to the two outside scholars.[8] It was an uncontradicted subsidiary or "conduct" fact that Freeland refused to send the Refutation to the scholars--kept secret from them plaintiff's plagiarism defense. But the legal decision as to

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8 Per the facts most favorable to the plaintiff, both the University "Red Book" regulations and the established practice of fully advising any "outside scholars" called in on a scholarship question of any materials the faculty member thought necessary to her position would have required these two Serbo-Croat scholars to be given plaintiff's Refutation.

whether it was "objectively reasonable" (or a violation of both procedural and substantive due process[9]) to withhold plaintiff's Refutation, her "side of the story", could not be made without

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9 Not sending plaintiff's Refutation was a violation of both procedural and substantive due process. With a procedural focus, this court has held:

> A fundamental requirement of due process is "the opportunity to be heard"....It is an opportunity which must be granted at a meaningful time and in a meaningful manner.

Armstrong v. Manzo, 390 U.S. 545 at 552 (1962).

> [I]f the initial view of the facts based on the evidence derived from non-adversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised.

Withrow v. Larkin, 421 U.S. 35 at 58 (1975). And the "opportunity...to present [one's] side of the story" is required whether the issue is <u>if</u> discipline is appropriate or <u>what</u> discipline is appropriate. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 at 546. The lower court here recognized that that procedural due process rule was "clearly established" (App. 10-14), as well as the alternative substantive due process mandate that defendants' actions could not be "arbitrary and capricious" (App. 15-19). The importance of the Refutation is demonstrated by the fact that when the plaintiff later gave the two scholars her Refutation, one reversed his initial position and advised the University that he never would have opined that there was plagiarism if he had been given the Refutation at the start, and the fact that the other expert who did not change his position was the only evidence against the plaintiff at the subsequent hearing (only proving again Emerson's precept that "mindless consistency is the hobgoblin of little minds").

knowing whether it should have been sent--what "the situation" was confronting Freeland--and that was a starkly disputed fact. The plaintiff's evidence was that Freeland was required to send it, while Freeland claimed that he was not.[10] The lower court implicitly recognized that it was a disputed fact, but vaulted o'er it to decide the ultimate question of law. The court twice held: that "Freeland reasonably could have viewed the expert evaluations [by the two "outside scholars"] as a preliminary, rather than critical stage of the proceedings"; and "we have no doubt that defendants would be entitled to qualified immunity because of the uncertainty over whether the university procedures apply in the circumstances of this case" (App. 14; 21, n. 9) (Emphasis supplied). The court was either holding that because the essential fact of whether the Refutation should have been sent was "disputed"--because there was "uncertainty"--that equated to "objective reasonableness" as a matter of law, or

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10 Given Freeland's deposition testimony, it may be elevating patent pretext to say that he denied that it should have been sent (it "would have potentially influenced their professional judgment"; he considered the usual "major personnel action" procedures to be "irrelevant or of marginal importance"), but petitioner will accept that testimony as characterizable as a denial for instant purposes. Note also, that this disputed fact was the reason specified here by the District Court to deny summary judgment (App. 1).

the court implicitly resolved the disputed fact in favor of Freeland, the party moving for summary judgment. Either holding constitutes patent error, as was detailed to the court in the inbanc petition.

The latter interpretation would be in blatant violation of the mandate of Fed.R.Civ.P. 56, that the court "look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party." *Harlow v. Fitzgerald, supra,* at 816; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).[11] Implicit in the Court's *Harlow-Mitchell-Malley-Anderson* quartet is the recognition that as important as is the policy for pretrial qualified immunity decisions, Rule 56 still applies with its usual effect. So too, those decisions of this Court implicitly recognize (as detailed above) that if the "situation" or "circumstances" confronting the official include essential facts that are disputed, "objective reasonableness" cannot be determined, and summary judgment

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11 Such a construct would ordinarily seem impossible to posit (that the facts could have been viewed "in the light most favorable to" Freeland), but nowhere in the lower court opinion is Rule 56 alluded to or the proper standard of review, and in *DeAbadia v. Izquierdo Mora,* 792 F.2d 1187 at 1205 (1st Cir. 1986), another qualified immunity-summary judgment case, Judge Torruella in dissent accused another First Circuit panel decision of "virtually amend[ing] Rule 56."

may not be granted.The first view of the lower court's holding is equally erroneous. "Uncertainty" as to an essential "circumstances" fact does not equate to "objective reasonableness" as a matter of law. While the lower court did nof make explicit that it was making that equation, it is an obvious reading and it echoes a previous decision of another First Circuit panel in *DeAbadia v. Izgnierdo Mora*, 792 F.2d 1187 (1st Cir. 1986), wherein Senior Judge Aldrich held, at 1193:

> Indeed, to labor the point, the very fact that there is a reasonable dispute means that, from the standpoint of qualified immunity, the law was not clearly established in plaintiff's favor.

The authority for that errant proposition is given as *Tubbesing v. Arnold*, 742 F.2d 401 (8th Cir. 1984), wherein the court held that "the fact that the application of the Policy Manual [to the directors] is disputed merely emphasizes that the law...was not clearly established." *Id.* at 406. (Cert. was not sought in either case.) The First and Eighth Circuits, therefore, have both misperceived the implicit teachings of this Court and promulgated dangerous contrary decisions.

The lower court's decision is also in conflict with decisions o f other Circuits, which have correctly recognized that when facts are disputed which are essential to knowing what "circumstances" or "situation" the official faced, summary judgment must be denied. Exemplary, is the case of *Waldrop v. Evans*, 871 F.2d 1030 (11th Cir. 1989), wherein the particular medical care given the plaintiff prisoner by one defendant doctor was "undisputed" (here, undisputed that Freeland did not send the Refutation), but it "remain[ed] a contested issue" of fact, after conflicting expert testimony, whether the treatment afforded complied with "reasonable professional skill and care" or was "deliberately indifferent medical care" (like here, whether Freeland should have sent the Refutation). Summary judgment was properly denied because the defendant prison doctor "failed to establish the absence of disputed issues of fact." In this case, the lower court's insensitivity to Rule 56 and the fundamental relevance of a disputed issue of fact about the "circumstances" worked a contrary result. For other Circuit opinions in direct conflict with this lower court decision *see:Geter v. Fortenberry*, 882 F.2d 167, 170-171 (5th Cir. 1989) (disputed "circumstances" made it impossible to determine qualified

immunity on summary judgment); *Pleasant v. Lovell*, 876 F.2d 787, 794 (10th Cir. 1989) ("constitutional implications of facts differ, depending upon which version [of the material events] is correct", so summary judgment is precluded on qualified immunity); *Williams v. Lane*, 851 F.2d 867, 882 (7th Cir. 1988) (since there was a dispute as to defendants' "justification" [albeit "shallow" and pretectual] for depriving plaintiff of clearly established rights, qualified immunity could not be established on summary judgment); *Harris by and through Harris v. Maynard*, 843 F2d 414, 417-418 (10th Cir. 1988) (defense of qualified immunity rejected and case allowed to go forward for discovery where significant factual disputes existed as to the circumstances of inmate's death); *Dominque v. Tebb*, 831 F.2d 673, 677 (6th Cir. 1987) (disputed facts would on remand defeat summary judgment); *Martin v. Malhoyt*, 830 F.2d 237, 263 (D.C. Cir. 1987) ("Without resolving the factual dispute as to what actually transpired", the court could not determine that the defendant "established the requisite objective reasonableness

of his actions").[12]

Since the lower court decision is "in conflict with applicable decisions of this Court" and "with decision[s] of [other] federal court[s] of appeals" on this important and recurring question, Rule 17.1, further clarification would provide a boon and help to avoid further unjust mischief, such as here occurred. One final caveat: the Court can see that making explicit that disputed "situation" or "circumstances" facts obviates summary judgment in qualified immunity cases will not constrain or unduly limit the underlying policy of protecting many officials from having to stand trial. In most cases these essential facts will not be genuinely disputed. The "probable cause" issue can be decided, for instance, in any warrant application case, since the "circumstances" will be as they are described "within the four corners" of the affidavit.

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12 Ironically, a case clearly recognizing the rule petitioner here espouses, and directly contrary to the lower court's decision, is *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988), by a different First Circuit panel. (Maybe that explains why only "a majority of" "the judges...in regular active service" did not vote inbanc review [App. 28].) The court held on page 136, that "objective reasonableness" "cannot be resolved in this case on summary judgment" because there was "a genuine issue of material fact as to whether a 'prison disturbance' as described in *Whitley* [*Whitley v. Albers*, 475 U.S. 312 (1986), establishing the context for permissible force], actually existed....construed in the light most favorable to *Unwin*....". *See also Emery v. Holmes*, 824 F.2d 143 (1st Cir. 1987).

2. Because It May Be Inferred From The Litany Of Defendants' Unfairnesses That Sanctioning The Plaintiff Was Their Pre-ordained Intention, The "Objective Reasonableness" Issue Merged With The "Arbitrary And Capricious" Ultimate Liability Issue And Summary Judgment Was Impossible.

The Court has yet to address an important issue which can arise, pre-trial, in some qualified immunity cases. In this case it was starkly presented. The *Anderson* dissenters put it thusly: a "type of case" where the *Harlow* "purely objective standard" "may be inapplicable" is when "the plaintiff can only obtain damages if the official's culpable state of mind is established." *Anderson v. Creighton, supra*, at 656, n. 12. The Courts of Appeal have (with the single exception of the opinion in this case) recognized that "objective legal reasonableness" cannot be determined on summary judgment when a defendant's "intent" or "state of mind" is an essential element of plaintiff's constitutional claim. *Feliciano-Angulo v. Rivera-Cruz*, 858 F.2d 40, 44, 47-48 (1st Cir. 1988) (the "intent motivating the official's conduct", "the principal disputed issue of fact in the case", was "a predicate to any meaningful qualified immunity analysis", so the court "was in no position to grant summary

judgment"); *Turner v. Dammon*, 848 F.2d 440, 444-445 (4th Cir. 1988) (when defendants conducted 100 administrative searches of plaintiff's bar over a year, even though the "motive or intent" or validity of each particular search was not in issue, summary judgment was foreclosed because the "disproportionate number" of the "series of bar checks" could inferably be found by a jury to constitute an ultimate unconstitutional "pattern of harassment"); *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1212 (9th Cir. 1988) (summary judgment on qualified immunity denied because a jury could infer from the subsidiary facts that the defendants had a "retaliatory motive" in terminating the plaintiff); *Allen v. Scribner*, 812 F.2d 426, 436 (9th Cir. 1987) (another allegedly unconstitutional firing case, the court denying summary judgment because "[a] jury must decide the issue of motivation").

In this case the plaintiff's most fundamental substantive due process claim, argued throughout her brief, was that the aggregate of the defendants' unfairnesses, from when her known antagonist levelled the plagiarism charge until the sanctions were accomplished, would permit a jury to infer that

sanctioning her was the defendants' "pre-ordained" or "pre-determined" intention. The very "disproportionate number" of various continuing unfairnesses made it a compelling inference that the defendants were intentionally "going through the motions" to a "pre-ordained result." Since the plaintiff was entitled to have the court "look at the record in the light most favorable to [her]...drawing all inferences most favorable to [her]", *Harlow* at 816, the ultimate fact common to liability and whether the defendants "should have known" they were denying he due process was, obviously, disputed and summary judgment impossible. The lower court held that "it was clearly established in our circuit that school authorities who make an arbitrary and capricious decision significantly affecting a tenured teacher's employment are liable for a substantive due process violation" (App. 16-17). Any reasonable official would of course, have to "know" that intentionally "going through the motions" to a "pre-ordained" sanctions result would, most assuredly, be "arbitrary and capricious." Analogously, every police officer is presumed to know that he cannot utilize "excessive force", so a jury must say if it was "excessive." A jury decision on plaintiff's ultimate constitutional liability issue

therefore merged with or became a predicate to any meaningful analysis of the qualified immunity issue. Summary judgment was impossible and the decision below erroneous for this second reason.

Inexplicably, however, the lower court refused to address this issue in its opinion.[13] Petitioner detailed this impermissible refusal to address the constitutional heart of her case in her inbanc petition:

> [T]he panel never applied that ["arbitrary and capricious"] constitutional rule of law to the comprehensive claim that the sanctions were "pre-ordained." That issue is fairly presented, is dispositive, and it must be addressed. (Emphasis in original).

The fact that the court again refused to address the issue--rehear the case--does not, of course, cause the error to disappear. Not being patent in the opinion itself, the error, admittedly, does not

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13 The only hints reflective of the fact that this "pre-ordained" substantive due process argument was plaintiff's principal claim throughout are the court's initial bland characterization of her "claims" (App. 9), and its ultimate conclusion that "[t]he problem with plaintiff's argument is that the factual dispute she identifies concerns the merits of her claim rather than the immunity issue" (App. 21).

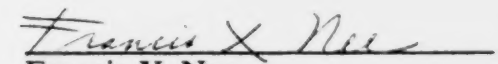
It should also be pointed out that the court erroneously makes it appear (App. 20-22) that plaintiff's principle substantive due process argument was that the defendants did not have an adequate evidentiary basis to censure her. That contention was but one of the links in the skein of unfairness.

have the prospective danger of misleading other courts, as does the first reason to grant the writ. The lower court's decision not to grant petitioner the jury trial to which she was entitled was, nonetheless, "a decision in conflict with the decision[s] of [other] federal court[s] of appeals", Rule 17.1, a decision most unjust to this petitioner, and one warranting remedy in this Court, whereby "an important question of federal law...[may be] settled by this Court." Rule 17.1.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to the United States Court of Appeals for the First Circuit.

Respectfully submitted,



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89-1042

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ANNY NEWMAN

V.

DIANA BURGIN, RICHARD M. FREELAND, ROBERT A. GREENE and ROBERT CORRIGAN, INDIVIDUALLY AND IN THEIR CAPACITIES AS OFFICERS OF THE UNIVERSITY OF MASSACHUSETTS, BOSTON

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 86-3379-H

ANNY NEWMAN, Plaintiff

V.

DIANA BURGIN, ET AL, Defendants

ORDER
July 21, 1988

HARRINGTON, D.J.

After a review of the record, this Court denies defendants' Motions for Summary Judgment on the federal and state civil rights claims because the issue of whether defendants failed to afford plaintiff adequate procedural due process is a factual matter for the jury to determine. Under the circumstances of this case, defendants' failure to provide plaintiff's refutation to the outside scholars during their initial review of the plagiarism charges could have deprived Plaintiff Newman of an opportunity to be heard, i.e., the opportunity to present a meaningful defense at a critical state of the proceedings.

The Court also denies Defendant Burgin's Motion For Summary Judgment on the state tort claims. Genuine issues of

material fact exist regarding defendant's actual malice and her intent toward plaintiff in raising these charges of plagiarism.

SO ORDERED.

/s/ Edward S. Harrington
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 88-1923

ANNY NEWMAN,
Plaintiff, Appellee

v.

COMMONWEALTH OF MASSACHUSETTS,
ET AL,
Defendants, Appellees

DIANA BURGIN, ET AL,
Defendants, Appellants

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(Hon. Edward F. Harrington, U.S. District Judge)

Before
Selya, Circuit Judge,
Aldrich and Coffin, Senior Circuit Judges

Lawrence T. Bench, First Associate Counsel, University of Massachusetts, for appellants.

Daniel F. Featherston, Jr., with whom Susan S. Riedel was on brief for plaintiff, appellee.

AUGUST 28, 1989

COFFIN, Senior Circuit Judge. Plaintiff Anny Newman, a tenured professor at the University of Massachusetts, was accused of publishing a plagiarized article. She claims the university wrongly censured her, and she therefore brought this suit against four university employees alleging the violation of Federal and state civil rights laws, and, as to one, state tort law. The district court denied the defendants' motions for summary judgment, which included a request that they be granted qualified immunity, and this interlocutory appeal followed. We find that the defendants are entitled to qualified immunity on plaintiff's due process claims, but that qualified immunity is premature at this time on her other claims. We do not reach any other issues in this limited appeal.

I.

We begin by describing only briefly the factual background of this case, providing more detail as necessary in other sections of the opinion.

Plaintiff Newman, an assistant professor in the Russian Department, filed a report for the 1982-83 academic year that listed an article she had published about a 17th-century Serbo-

Croatian poem.[1] After reviewing the report, defendant Diana Burgin, chairperson of the Russian Department, informed members of the department's personnel committee that she believed there were resemblances between the article listed in the report and a book published in German in 1952 by Vsevolod Setschkareff.

The personnel committee notified plaintiff that questions had been raised about her article. A short time later, the committee communicated its concerns about the piece to defendant Richard Freeland, dean of the College of Arts and Sciences. Plaintiff submitted a detailed "Refutation" to Freeland, explaining that the challenged article was a revision of her master's thesis submitted at Harvard University in 1962. She further explained that her thesis advisor had assigned two basic texts to be used a sources and models for the thesis, one of which was the Setschkareff book. In addition, plaintiff said she had worked with Professor Setschkareff, her Russian literature professor, in preparing the thesis.

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1 Each faculty member at the Boston campus of the University of Massachusetts must file an Annual Faculty Report that is reviewed by her department and the dean of the college.

Freeland solicited the advice of two outside experts on whether plagiarism, in the sense of similarities, had occurred and appointed a special committee to advise him on the question of plagiarism and what sanctions, if any, should be imposed on plaintiff. One of the outside experts concluded that plaintiff had plagiarized. The other expert described her method of documentation as substandard. He concluded that her work represented "able but less than meticulous scholarship," and that proving deliberate plagiarism would be difficult. [2] The committee's report concluded that plaintiff's article and thesis "is an objective instance of plagiarism" but because of mitigating circumstances recommended that plaintiff only be censured for "seriously negligent scholarship."

In a written proposal to the provost of the Boston campus, Freeland adopted the findings and recommendation of the committee and listed six actions for implementing the censure. These included a public reading of a letter of censure before the University's Faculty Council and College Senate, and

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2 Plaintiff independently solicited opinions from five scholars. In general, they felt that even if her work was in some instances underdocumented, it represented acceptable scholarship.

a bar against plaintiff's serving as chair of her department or voting on degrees.

The provost and chancellor, both defendants in this case, concurred in Freeland's recommendation, and the chancellor directed that the sanctions be carried out. After the letter of censure was read to the Faculty Council and College Senate, plaintiff read a statement in response before each faculty body.

Plaintiff filed this action in November 1986. She claims that the University officials violated her right to procedural due process in the manner in which they handled the plagiarism charge and to substantive due process by ultimately resolving the charge against her on the merits. These claims were brought under both state and federal civil rights laws. See 42 U.S.C. §1983; Mass. Gen. Laws Ann. ch. 12, §11I. She also brought three state common law claims against defendant Burgin alone, alleging intentional interference with an economic relationship, intentional infliction of emotional distress, and defamation.

Defendants filed a motion for summary judgment claiming that plaintiff suffered no constitutional injury and that defendant Burgin did not violate state tort law. They also claimed qualified immunity from damages on all claims. The

district court denied the motion, stating that factual matters remained for the jury to determine. The court made no explicit reference to qualified immunity, but presumably intended its denial of summary judgment to cover the immunity claim.

II.

We must establish at the outset of our discussion the proper scope of this appeal. The district court denied defendants' motion for summary judgment on all issues. Defendants have urged us to review at this time not only the district court's denial of qualified immunity but also its decision to deny summary judgment on the merits of the federal and state claims. We decline, however, to depart from our now well-established practice of limiting our interlocutory review to the issue of qualified immunity. *See, e.g., Goyco de Maldonado v. Rivera* , 849 F.2d 683, 684 (1st Cir. 1988); *Quintana v. Anselmi,* 817 F.2d 891, 892 n. 3 (1st Cir. 1987); *Bonitz v. Fair* 804 F.2d 164, 173-76 (1st Cir.1986), *overruled on other grounds, Unwin v. Campbell* 863 F.2d 124, 132 (1988). We have adhered to this limitation even when the merits of a particular case are "inexorably intertwined" with the qualified

immunity issue. *See Unwin v. Campbell*, 863 F. 2d 124, 133 n. 9 (1st Cir. 1988); *Feliciano-Angulo v. Rivera-Cruz*, 858 F.2d 40, 44 (1st Cir. 1988). We therefore discuss only the immunity issue.

III.

Plaintiff's civil rights claims allege violations of both her procedural and substantive due process rights.[3] She claims that the defendants violated her right to substantive due process because their investigation and decision-making on the plagiarism charge was arbitrary and capricious. Her allegation of a procedural due process violation is based on many of the same deficiencies in process that underlie her substantive claim. Moreover, she claims that defendants' handling of the plagiarism charge was so inadequate that any reasonable person would have known that their conduct was a violation of her "clearly established substantive and procedural due process rights, and that defendants therefore are not entitled to qualified immunity from damages. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982); *Unwin v. Campbell*, 863 F.2d 124, 128 (1st Cir.

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3 In all ways relevant to this appeal, plaintiff's complaint treated identically the federal and state civil rights claims. Defendants also take the position that these claims are correlative. Accordingly, we shall assume this to be the case, but without deciding the point.

1988); *Durate v. Healy*, 405 Mass. 43, 47, 537 N.E. 2d 1230, 1232 (1989).[4]

We shall being with a discussion of the procedural claim.

A. Procedural Due Process.

It is without question that plaintiff, a tenured professor who faced the possibility of dismissal as a result of the plagiarism charge, was entitled to the protections of procedural due process, and that this due process right was clearly established at the time defendants acted. See *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

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4 The question of qualified immunity under the Massachusetts Civil Rights Act is properly before us on this interlocutory appeal because the Supreme Judicial Court has construed this immunity to protect a defendant from suit and not just from liability. *See Durate*, 405 Mass. at 44 n. 2, 537 N.E. 2d at 1231 n. 2 (discussing immunity under Massachusetts Civil Rights Act) (*citing Breault v. Chairman of the Bd. of Fire Comm'rs of Springfield*, 401 Mass. 26, 30-31, 513 N.E. 2d 1277, 1280-81 (1987)). In order to give full effect to this substantive protection from harassing litigation, it is necessary to provide for interlocutory review of a denial of immunity. As in the case of section 1983 immunity, a denial of a defendant's motion for immunity under the Massachusetts Civil Rights Act meets the requirements of the "collateral order" doctrine and is therefore appealable as a final decision under 28 U.S.C. §1291. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-529 (1985); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949). *See also Sorey v. Kellett*, 849 F. 2d 960, 962-63 (5th Cir. 1988); *Marrical v. Detroit News, Inc.*, 805 F.2d 169, 172-74 (6th Cir. 1986).

Recognizing plaintiff's clearly established right does not end our inquiry, however. We must decide whether defendants reasonably should have understood that their specific actions violated that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Unwin*, 863 F.2d at 131.

We recently have observed that the concept of due process is equivalent to "fundamental fairness" and that "[n]otice and an opportunity to be heard have traditionally and consistently been held to be the essential requisites of procedural due process." *Gorman v. University of Rhode Island*, 837 F.2d 7, 12 (1st Cir. 1988). *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). We further elaborated in *Gorman*::

> The hearing, to be fair in the due process sense, implies that the person adversely affected was afforded the opportunity to respond, explain, and defend. Whether the hearing was fair depends upon the nature of the interest affected and all of the circumstances of the particular case.

837 F.2d at 13.

The undisputed facts in this case show that plaintiff was notified of the plagiarism charge against her at the outset of the investigation and was given multiple opportunities "to respond, explain, and defend." Her detailed "Refutation", submitted to Dean Freeland, became a part of the record that was passed on to higher levels of the university hierarchy. She was given the opportunity to respond to the reports filed by the outside experts and the dean's committee. She was entitled to call and cross-examine witnesses at a hearing before the dean's committee, and was permitted to submit any other evidence in her behalf. She also drafted additional responses to the provost and chancellor before they made decisions about whether to adopt Dean Freeland's recommended course of action.

Thus, plaintiff had more than ample opportunity to explain and defend the similarities between her work and Professor Setschkareff's long before any action was taken against her. At every step along the way, defendants gave plaintiff notice of their intended procedure and sought her input. Plaintiff points to no case in which this much involvement in the decision-making process was found to be constitutionally

inadequate. The cases she cites involve complete failures to consider the plaintiff's point of view. *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (no hearing before security guard dismissal); *Goss v. Lopez*, 419 U.S. 565 (1975) (no hearings concerning student suspensions); *Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773 (9th Cir. 1982) (no hearing before teacher dismissal); *Anapol v. University of Delaware*, 412 F.Supp. 675 (D. Del. 1976) (no hearing before professor's dismissal); *Davis v. Alabama State University*, 613 F.Supp. 134 (M.D. Ala., N.C. 1985) (denial of due process where plaintiff had no opportunity to respond to information in his personnel file). *See also Anderson*, 483 U.S. at 640 ("in the light of pre-existing law the unlawfulness must be apparent"). We therefore conclude that defendants reasonably could have believed that the manner in which they conducted the plagiarism investigation satisfied the requirements of procedural due process.

The district court, however, held that the defendants' failure to send plaintiff's refutation to the outside experts could be viewed as a due process violation. It could be, the court stated, that this action denied her "the opportunity to present a

meaningful defense at a critical state of the proceedings." The question before us, however, is whether Dean Freeland should have known that failure to provide the refutation to the experts amounted to a constitutional violation.

Freeland's decision to withhold plaintiff's response was not so clearly inconsistent with her procedural rights that he could be charged with knowledge of a constitutional violation. The experts were asked to comment only upon whether plaintiff's work could be characterized as plagiarism based on the similarities with Setschkareff's work. These experts did not take part in the decision to sanction plaintiff. Everyone who participated in that decision was given a copy of plaintiff's response, and was able to weigh for himself the significance of the copying in light of its context. Thus, Freeland reasonably could have viewed the expert evaluations as a preliminary, rather than critical, stage of the proceedings, with the plaintiff being fully able to present her defense in a meaningful way through submission of the refutation to him and his superiors.

Nor do any of plaintiff's other alleged procedural deficiencies alter our conclusion that defendants are entitled to qualified immunity. Plaintiff was not entitled to "perfect"

process, and the fact that she can point to ways in which the procedure could have been fairer does not detract from our conclusion that the defendants should not reasonably have viewed their process to be insufficient. Indeed, on this record the adequacy of process would seem clear.

We hold, therefore, that defendants are entitled to qualified immunity on plaintiff's procedural due process claims under federal and state law.

B. Substantive Due Process.

Plaintiff contends that the defendants' actions amounted to a violation of her clearly established substantive due process right to be free from arbitrary and capricious decisions affecting her employment status. Plaintiff derives her substantive right largely from two First Circuit decisions explicitly holding that nonrenewal of teacher contracts would be found arbitrary and capricious in violation of the Fourteenth Amendment if the stated reason for the action was "trivial, or is unrelated to the educational process...or is wholly unsupported by a basis in fact." *McEnteggart v. Cataldo*, 451 F.2d 1109, 1111 (1st Cir.

1971); *Drown v. Portsmouth School Dist.*, 451 F.2d 1106, 1108 (1st Cir. 1971).[5]

Plaintiff also relies more generally on other cases articulating the principle that substantive due process protects an individual against arbitrary action by the government. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Dent v. West Virginia*, 129 U.S. 114, 123 (1889); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988); *Brenna v. Southern Colorado State College*, 589 F.2d 475, 476-77 (10th Cir. 1978); *Jeffries* v. *Turkey Run Consolidated School Dist.*, 492 F.2d 1, 3-4 (7th Cir. 1974); *Black v. Sullivan*, 561 F.Supp. 1050, 1061 (d. Me. 1983); *Beatham v. Manson*, 369 F.Supp. 783, 789-92 (D. Conn. 1973).

We are persuaded that at the time defendants acted it was clearly established in our circuit that school authorities who make an arbitrary and capricious decision significantly affecting

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5 Our discussion in this section assumes that it is plaintiff's property interest in her job that triggers her substantive due process rights. The decision to censure plaintiff may also have implicated a liberty interest because the charge of plagiarism likely would "seriously damage [her] standing and associations in [her] community." *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). *See also Goss v. Lopez*, 419 U.S. 565 (1975). Assuming, without deciding, that this liberty interest would be protected by a clearly established substantive due process right, we have been given no reason to treat the property and liberty interests differently in deciding whether defendants are entitled to qualified immunity.

a tenured teacher's employment status are liable for a substantive due process violation. [6] In reaching this conclusion, we recognize that the courts are not yet unanimous on whether this substantive right exists, *see infra*, and that the Supreme Court several times in the last decade has sidestepped the question of whether the Fourteenth Amendment provides substantive protection against arbitrary and capricious academic decision-making. *See Regents of University of Michigan v. Ewing*, 474 U.S. 214, 222-223 (1985) (student dismissal); *Id.* at 228-230 (concurring opinion of Powell, J.); *Harrah Independent School District v. Martin*, 440 U.S. 194, 197-98 (1979) (*per curiam*) (teacher dismissal); *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 91-92 (1978) (student dismissal).

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6 Although *Drown* and *McEnteggart* specifically concerned the loss of jobs through nonrenewal of contracts, we believe the principle established in those cases clearly is applicable to other types of employment actions that substantially damage an employee's property interest in her job. In this case, plaintiff was barred from voting on degrees and from serving on important university committees or as chair of her department. A letter of censure for an act of "objective plagiarism" and "seriously negligent scholarship" was placed in her permanent file, an action that undoubtedly affects her ability to secure other employment in the future. We think it obvious that this severe sanction substantially damaged plaintiff's property interest in her position.

Yet our holding in *Drown* and *McEnteggart* was unequivocal, and that conclusion was reaffirmed without question in subsequent cases. *See Willens v. University of Massachusetts*, 570 F. 2d 402, 406 (1st Cir. 1978); *Wishart v. McDonald*, 500 F.2d 1110, 1113, 1115 (1st Cir. 1974). *See also Perkins v. Board of Directors*, 686 F.2d 49, 50 n. 3 (1st Cir. 1982) (noting that plaintiff failed to make a colorable showing of her allegation that the decision not to renew her contract was arbitrary and capricious).[7]

In addition, we note that at the time of plaintiff's censure, most circuits that had considered the issue either has held explicitly or had suggested that the Fourteenth Amendment protects public employees from arbitrary and capricious government action affecting their employment. *See, e.g., Gargiul v. Tompkins*, 704 F.2d 661, 668 (2d Cir. 1983), *vacated on other grounds*, 465 U.S. 1016 (1984); *Barnett v. Housing Authority of Atlanta*, 707 F.2d 1571, 1577-78 (11th Cir. 1983) (requiring improper motive in addition to arbitrary

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7 Although *Drown* and *McEnteggart* were overruled by the Supreme Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) to the extent that they gave untenured teachers procedural due process protection, that decision does not affect their applicability in cases involving tenured teachers.

action); *Brenna*, 589 F.2d 475, 476-77 (10th Cir. 1978) *Parham v. Hardaway*, 555 F.2d 139, 142 (6th Cir. 1977); *Miller v. Dean*, 552 F.2d 266, 268 (8th Cir. 1977); *Kowtoniuk v. Quarles*, 528 F.2d 1161, 1165-66 (4th Cir. 1975). *But see Brown v. Brienen*, 722 F.2d 360 (7th Cir. 1983) (no substantive due process protection for state-created property interest in employment). Thus, even if in the future this circuit or the Supreme Court rejects the view that a public employee has a substantive due process right in these circumstances, our recognition of that right was clear at the time defendants acted and it is still viable law today.[8]

Our conclusion that plaintiff's substantive due process right was clearly established means that, under *Drown* and *McEnteggart*, defendants should have known that they were violating the law if their decision to censure plaintiff was unrelated to educational concerns, taken for trivial reasons, or wholly unsupported by any basis in fact. 451 F.2d at 1108; *id.*

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[8] The Ninth Circuit recently concluded that in 1984 there was no clearly established constitutional right to substantive due process protection for continued public employment. *Lum v. Jensen*, 876 F.2d 1385 (9th Cir. 1989). The court based its conclusion on the absence of binding precedent in its own circuit combined with the conflict among the circuits that had reached the issue. Our case clearly is distinguishable because *Drown* and *McEnteggart* are direct precedent.

at 1111. Knowledge that the law forbade a wholly unsupported decision is not, however, sufficient reason to deny defendants qualified immunity. Defendants are liable for damages only if they should have known that what they did violated the law. *See Anderson*, 483 U.S. at 638 (qualified immunity protects government officials performing discretionary functions "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated").

Plaintiff contends that defendants should not be granted summary judgment based on qualified immunity because genuine issues of material fact remain concerning whether defendants had reason to censure her. She stresses that defendants censured her based largely on the views of one expert who concluded that plagiarism had occurred, despite the considerably less damning opinion of the other outside expert and the directly conflicting opinions of five scholars she contacted independently. Plaintiff's argument is that the differing opinions over whether her research methods represented adequate, if not perfect, scholarship demonstrate a

factual dispute over whether the severe censure was unwarranted, and therefore arbitrary.[9]

The problem with plaintiff's argument is that the factual dispute she identifies concerns the merits of her claim rather than the immunity issue.[10] Even if it ultimately can be shown that the decision to censure her was arbitrary -- if, for example, it turns out that the "expert" who found plagiarism lacked any knowledge of Serbo-Croatian literature --defendants are entitled to immunity from damages so long as they had no reason to know that the evidence on which they relied was faulty. So long as they had a good faith belief that the evidence was worthy of trust -- even if it represented a minority viewpoint -- they

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9 Plaintiff also suggests that defendants violated her substantive due process rights by failing to follow the procedures specified in the University's Academic Personnel Policy for "major personnel actions." Even if it was clearly established that violations of internal procedures may constitute deprivations of substantive due process, which we doubt, *see Perkins v. Board of Directors*, 686 F.2d 49,. 51 n. 5 (1st Cir. 1982), we have no doubt that defendants would be entitled to qualified immunity because of the uncertainty over whether the university procedures apply in the circumstances of this case.

10 Indeed, her arguments may even be irrelevant on the merits. To hold defendants liable, it is insufficient for plaintiff to show that they made the "wrong" decision. She must show that the decision to censure her was entirely unsupported. *See* note 11 *infra*.

reasonably could have believed that their decision had a basis in fact and therefore was not arbitrary. [11]

Plaintiff has articulated no material factual dispute over the reasonableness of defendants' reliance on the expert and committee reports. She does not contend that these opinions were transparently without merit -- that, for example, defendants should have known that the outside expert who found plagiarism was totally unqualified to evaluate Serbo-Croatian literature. Nor does she contend that defendants relied on anything other than these opinions and their own evaluations of her work. Her complaint is that defendants made the wrong choice in adopting the views of those who found plagiarism, and not that defendants reasonably should have known that those views were completely unworthy of reliance.

Plaintiff's protest about the constituency of the dean's committee -- that the members were generally faculty rather than a panel of experts -- is insufficient to challenge the reasonableness of defendants' reliance on the committee. She

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11 We note that this approach is consistent with the approach used for reviewing an academic decision in *Ewing*, 474 U.S. at 225. The Court stated that judges "may not override [a genuinely academic decision] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."

must show not only that others were more qualified to evaluate her work, but that it was so inappropriate to rely on the non-experts that defendants could not reasonably have done so. She has not made such a showing.[12]

Because plaintiff has failed to raise a substantial factual dispute over whether defendants should have known that their decision to censure her was wholly without support, [13] they are entitled to qualified immunity on the substantive due process claim.[14]

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12 We emphasize that even if defendants' conclusion about the quality of plaintiff's research was against the weight of the evidence, as plaintiff alleges, the decision to censure her would not necessarily be arbitrary, and therefore a violation.

13 The nature of the substantive due process claim alleged against defendant Burgin, who did not participate in the decision to censure plaintiff, is unclear. Burgin's role was to trigger the investigation that led to the censure. Plaintiff's claim may be that Burgin's decision to alert the Russian Department personnel committee to the possibility of plagiarism was arbitrary and capricious. In light of the expert and committee reports, however, we cannot say that Burgin reasonably should have known that the similarities she perceived between plaintiff's work and Setschkareff's were so insignificant that the suspicion of plagiarism reported to the personnel committee was unfounded and arbitrary.

14 Plaintiff's failure to demonstrate a genuine issue of material fact sufficient to defeat defendants' motion for summary judgment based on qualified immunity protects defendants from liability for damages even if plaintiff ultimately proves at trial that they could not reasonably have relied on the expert and committee findings of plagiarism. Plaintiff had ample opportunity for discovery, and allowing a reconsideration of the immunity question at trial would defeat the principle that that issue be resolved as early as possible. *See Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818 (1972).

IV.

Plaintiff alleges three state tort claims against only defendant Burgin: defamation, interference with contractual relations and intentional infliction of emotional distress. In *Gildea v. Ellershaw*, 363 Mass. 800, 820, 298 N.E. 2d 847, 858-59 (1973), the Massachusetts Supreme Judicial Court established an immunity for the good-faith discretionary acts of public officials performed within the scope of their official authority. *See also Duarte*, 405 Mass. at 49-50 & n. 5, 537 N.E. 2d at 1234. [15] Thus, even if Burgin violated plaintiff's rights under state law -- a matter as to which we take no view -- she would be immune from suit so long as she was acting "in good faith, without malice and without corruption." *Gildea*, 363 Mass. at 820, 298 Mass. at 859.[16]

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15 This immunity is intended to protect defendants from suit, and therefore, is properly addressed in an interlocutory appeal. *See Duarte*, 405 Mass. at n. 2, 537 N.E. 2d at n. 2.

16 Defendants' brief does not explicitly rely on *Gildea* as a basis for immunity, instead arguing that Burgin is entitled to summary judgment n the state tort claims based on a qualified "privilege", *see infra* at note 18. In their Motion for Summary Judgment, however, defendants stated not only that their actions were privileged but also that they acted in good faith and their brief also describe *Gildea* as recognizing official immunity for discretionary acts of public officials. In these circumstances, we do not consider the issue of common law immunity to have been waived.

This good faith immunity is of no avail to defendant Burgin at this time, however. As the district court found, a genuine issue of material fact remains concerning her motives. Plaintiff asserts, and defendants acknowledge, that Burgin and the plaintiff had a history of animosity toward each other. [17] Burgin triggered the plagiarism investigation and, if it turns out that plaintiff's censure was unjustified, this evidence of bad feelings could support a factfinder's judgment that Burgin acted maliciously. We therefore affirm the district court's denial of immunity on the state tort claims. [18]

We summarize our holdings:

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17 In his deposition, Dean Freeland testified that this animosity had been "in the air for a long period of time as part of the folklore of the institution...It's famous in our institution...." Appendix at 430.

18 We decline to consider whether Burgin is entitled to summary judgment based on a qualified privilege under Massachusetts law. *See* note 16 *supra.* She asserts that a privilege defense is available on the state tort claims when an employee, in good faith, disseminates certain job-related information about a fellow worker. We do not believe it is appropriate to consider the question of privilege in this interlocutory appeal. We have been cited no case indicating that the Massachusetts courts view the qualified privilege as an immunity from suit, as distinguished from an immunity from liability. *See Restatement (Second) of Torts* §592A, Conditional Privileges (1977) (describing privileges as protection against liability). The district Court's rejection of Burgin's motion for summary judgment based on qualified privilege is therefore not a final judgment reviewable in an interlocutory appeal. *See Breault v. Chairman of the Bd. of Fire Comm'rs of Springfield*, 401 Mass. 26, 30-31, 513 N.E. 2d 1277, 1280-81 (1987).

1. Well-established First Circuit precedent limits our review in this case to the issue of qualified immunity;

2. Because the defendants could not reasonably have known that their actions in conducting the plagiarism investigation and censuring plaintiff violated her clearly established right to procedural due process, they are entitled to qualified immunity on that claim;

3. Because plaintiff has shown no factual dispute over whether defendants reasonably should have known that the evidence on which they relied to censure her was without foundation, they are entitled to qualified immunity on plaintiff's substantive due process claim;

4. Defendant Burgin is not entitled to qualified immunity on plaintiff's three tort claims at this stage of the proceedings because a genuine issue of material fact remains concerning her motives.

Reversed in part, affirmed in part. No costs.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 88-1923

ANNY NEWMAN,
Plaintiff, Appellee

V.

COMMONWEALTH OF MASSACHUSETTS,
ET AL.,
Defendants, Appellees

DIANA BURGIN, ET AL.,
Defendants, Appellants

JUDGMENT
ENTERED: August 28, 1989

This cause came to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The order of the district court is reversed in part and affirmed in part in accordance with the opinion filed this date.

No costs.

By the court,
Francis P. Scigliano
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 88-1923

ANNY NEWMAN,
Plaintiff, Appellee

V.

COMMONWEALTH OF MASSACHUSETTS,
ET AL
Defendants, Appellees

DIANA BURGIN, ET AL
Defendants, Appellants

BEFORE
Campbell, Chief Judge,
Aldrich, and Coffin, Senior Circuit Judges,
and Bownes, Breyer, Torruella and Selya,
Circuit Judges

ORDER OF COURT
Entered: September 25, 1989

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding a rehearing inbanc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court inbanc.

It is ordered that the petition for rehearing and the suggestion for rehearing inbanc be denied.

By the Court:
Francis P. Sicgliano, Clerk

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge theprivileges or immunicities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CIVIL RIGHTS

Ch. 21 42 §1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(3)

No. 89-1042

In the Supreme Court of the United States

OCTOBER TERM, 1989

ANNY NEWMAN,
PETITIONER,
v.
DIANA BURGIN, RICHARD M. FREELAND, ROBERT A. GREENE AND ROBERT A. CORRIGAN,
INDIVIDUALLY AND IN THEIR CAPACITIES AS OFFICERS OF THE UNIVERSITY OF MASSACHUSETTS AT BOSTON,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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I

QUESTION PRESENTED

Whether state university administrators were entitled to qualified immunity from a civil rights suit for money damages brought by a university professor they had censured for plagiarism, where despite claims of violations of due process the plaintiff was given fair notice and ample opportunity to respond to the charges and was never able to articulate *any* procedural protection (whether or not clearly established) of which she was improperly deprived, and where the decision to censure her was based on substantial evidence and clearly related to the interests of the university.

PARTIES

The captions of the Petition and of this Brief in Opposition list all parties to the proceeding in the Court of Appeals. Although the caption in that Court listed the Commonwealth of Massachusetts as a defendant-appellee, the Commonwealth had earlier been dismissed as a defendant in the District Court through amendment of the complaint. See generally *Newman* v. *Commonwealth of Mass.*, 115 F.R.D. 341, 342 (1987). The amended complaint which was the subject of respondents' motion for summary judgment and of the appeal did not name the Commonwealth as a defendant.

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Opinions Below

The opinion of the District Court is unreported. It is reproduced at pp. 1-2 of the Appendix to the Petition. The opinion of the Court of Appeals for the First Circuit is reported at 884 F.2d 19 and is reproduced at pp. 3-27 of the Appendix to the Petition; the order denying rehearing appears at p. 28 of the Appendix to the Petition.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on August 28, 1989 (see p. 27 of App. to Petition). The petitioner's petition for rehearing and suggestion for rehearing in banc, filed on or about September 11, 1989, were denied on September 25, 1989 (*id.* at p. 28). The Petition (at p. 2) otherwise adequately sets forth the grounds for jurisdiction.

Constitutional and Statutory Provisions

The pertinent provisions of Section 1 of the Fourteenth Amendment to the United States Constitution and of 42 U.S.C. § 1983 are set forth at p. 29 of the Appendix to the Petition.

Statement of the Case

Petitioner Anny Newman is a tenured professor in the Russian Department at the University of Massachusetts at Boston, a state institution. She filed a civil rights action under 42 U.S.C. § 1983, with pendent state claims in civil rights and tort, against four administrators of the University. The petitioner alleged that the respondents had violated her rights to procedural and substantive due process in the course of proceedings which had culminated in the University's censure of petitioner for "seriously negligent scholarship" based on her having published an article that was found to have been plagiarized.

Petitioner Newman included in her annual faculty report for the 1982-83 academic year the fact that she had published an article about a 17th-century Serbo-Croatian poem. After reviewing the annual report and reading a copy of petitioner's article, respondent Diana Burgin, Chairperson of the Russian Department, notified members of the department's personnel

committee that she had perceived resemblances between the petitioner's article and a book published in German in 1952 by Vsevolod Setschkareff. The personnel committee notified the petitioner about the perceived resemblances on or about November 22, 1983. A few weeks later the committee communicated its concerns to respondent Richard Freeland, Dean of the College of Arts and Sciences, who discussed the matter with petitioner and agreed not to take any further action until she had filed a written response. In mid-March, 1984, petitioner filed a detailed response which she captioned a "Refutation." In it she asserted that her recently published article was a revision of the master's thesis she had submitted at Harvard University in 1962, that her thesis advisor had assigned the Setschkareff book to be used as a source, and that she had consulted with Setschkareff himself in the course of her research on the thesis. The "Refutation" also included analysis of the challenged sections of her article with references and quotations from the subject poem and other sources, much of which was rendered without translation in Serbo-Croatian or German.

Respondent Freeland decided to seek outside, expert advice before deciding whether to initiate any disciplinary proceedings against petitioner. He sent the plaintiff's article and thesis, with all identifying material deleted, and the Setschkareff book to two Serbo-Croatian scholars outside the University of Massachusetts and asked them for their judgment, based on the texts alone, whether plagiarism was involved. One of the outside experts concluded that petitioner had plagiarized. The other expert described her method of documentation as substandard, as "able but less than meticulous scholarship produced by a highly impressionable and freely acquisitive writer. . . ." He thought, however, that it would be a "difficult, distasteful and thankless task to try to prove . . . conscious, deliberate and outright plagiarism." Respondent Freeland provided petitioner with the experts' reports and invited her response; she did not respond.

In early 1985, after receipt of the reports, respondent Freeland appointed a special faculty committee to hear the case and advise him whether plagiarism had occurred and whether any sanctions should be imposed upon the petitioner. The petitioner was notified of the evidence to be considered by the special committee, was allowed to call witnesses and submit evidence in her own behalf, and cross-examine any witnesses called by the committee. She was also allowed to have a faculty colleague of her choice appear with her at the hearing.

After its hearing, the faculty committee reported to respondent Freeland its conclusion that petitioner's article and thesis represented "an objective instance of plagiarism."[1] Because of what it deemed mitigating circumstances, however, the committee recommended that petitioner only be censured for "seriously negligent scholarship."

The petitioner was provided with a copy of the committee's report and allowed the opportunity to respond in writing. After receiving her memorandum, respondent Freeland submitted a written recommendation to respondent Robert A. Greene, Provost of the Boston campus, wherein Freeland adopted the findings and recommendations of the committee and proposed several specific actions for implementing the censure. These included public reading of a letter of censure before two bodies of the university faculty, sending notice of the findings to Harvard University and the publisher of the petitioner's article, and prohibiting petitioner from serving as chair of her department or voting on the award of degrees. Respondent Greene, after allowing petitioner to respond to Freeland's recommendation, forwarded the proposal with his

[1] See App. 6, 884 F.2d at 21. Petitioner's assertion at p. 9 of the Petition that the committee found that she "had not committed 'plagiarism'" is only the most egregious misstatement in an often fanciful version of the facts. Page 225 of the record appendix in the Court of Appeals is page 4 of the committee's report and is reproduced at p. 10 *infra*. Having quoted a definition of plagiarism and recited its conclusion that petitioner's article and thesis was an "objective instance of plagiarism," the committee stated: "Indeed, every form of plagiarism listed in the above definition appears in Professor Newman's article/thesis."

approval to respondent Robert A. Corrigan, Chancellor of the Boston campus. After again allowing petitioner to respond in writing, respondent Corrigan in October, 1985, effected the censure of the petitioner in the manner that had been recommended.

Petitioner filed an action in the United States District Court under 42 U.S.C. § 1983, seeking money damages and injunctive relief, with pendent claims under a state civil rights law (Mass. Gen. Laws, c. 12, § 11I) and tort claims against respondent Burgin.[2] Respondents filed a motion for summary judgment which included a claim of qualified immunity from money damages. The District Court denied the motion, holding, with respect to the civil rights claims, that whether respondents failed to provide petitioner with due process was a factual matter for the jury to decide. (App. 1.) On appeal by the respondents, the Court of Appeals reversed so much of the District Court's order as denied them qualified immunity on the due process claims. (App. 26.)

Reasons for Denying the Writ

I. The Case Presents No Split Of Authority Requiring Resolution By This Court.

The decision of the First Circuit in this case represents no departure from the pertinent decisions of this Court and no split of authority from decisions in the other circuits. The First Circuit expressly followed *Anderson* v. *Creighton*, 483 U.S. 635 (1987), in analyzing the respondents' entitlement to qualified immunity. (See App. at 11, 13, 20.) The court also followed well-established precedent in analyzing the petitioner's due process claims (see App. at 11-13); indeed, its treatment of the

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[2] The state civil rights claims were treated by the Court of Appeals and all parties as correlative with § 1983 for all purposes material to the petition in this Court. (See Petition at 3; App. at 9, n. 3.) The tort claims are not presently material in light of their disposition by the Court of Appeals.

substantive due process issue was markedly generous to petitioner's position in comparison with other circuits. (See App. at 16-19 and n. 9.) There is nothing presented in the case which offers this Court an occasion to clarify or develop any important principle of broad applicability.

Petitioner's assertion that the First Circuit failed to follow precedents of this Court, and also differed with decisions of other circuits, depends upon a tortuous argument which confuses disagreements over the legal appropriateness of procedures with genuine disputes as to material facts. As the Court of Appeals recognized (App. at 12, 20-23) there is no dispute as to any fact material to the issue of qualified immunity. Petitioner argues that the question whether respondent Freeland "should" have sent her "Refutation" to the outside experts "was a starkly *disputed fact.*" (Petition. at 14-16, emphasis in original.) But whether the dean "should" have followed a particular procedure — *i.e.*, whether he was required to do so by the dictates of due process — is by its very nature an issue of law, not of fact. See, *e.g.*, *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 541-542 (1985).

The decisions from other circuits, from which the petitioner claims the First Circuit differed, all involve disputes as to matters of fact, as distinguished from law. *Waldrop* v. *Evans*, 871 F.2d 1030 (11th Cir. 1989), involved a conflict of medical opinion as to the quality of treatment rendered in the case, not a dispute as to the requirements of due process. *Geter* v. *Fortenberry*, 882 F.2d 167 (5th Cir. 1989), concerned a dispute whether a police officer had procured false identifications and concealed evidence. *Pleasant* v. *Lovell*, 876 F.2d 787 (10th Cir. 1989), found a conflict of evidence as to whether IRS agents knew and authorized what a non-employee investigator was doing. Similarly, all the other cases cited by petitioner as being in conflict with the First Circuit (Petition at 19-21) either involved genuine issues of material fact, as opposed to disputed issues of law, or are not germane at all.

The two questions of due process which petitioner seeks to bring to this Court are, first, whether respondent Freeland should have sent petitioner's "Refutation" to the outside experts before he had decided whether or not to initiate proceedings (Petition at 14-16) and, second, whether Freeland should have followed certain procedures allegedly prescribed by the University's "Red Book" personnel regulations (*id.* at 6-7, 16). Neither issue has any apparent applicability beyond the circumstances of this case, and neither demonstrates any split of authority among the lower courts requiring resolution by this Court.

II. The Decision Of The Court Of Appeals Was Correct On The Qualified Immunity Issue.

The First Circuit properly held that the respondents were entitled to immunity from money damages unless petitioner could show that they had violated her rights under clearly established law. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985); *Anderson* v. *Creighton*, 483 U.S. 635 (1987). Indeed, petitioner was unable to show, or raise any legitimate factual dispute, that respondents had violated any of her rights at all. As the circuit court noted, "[i]ndeed, on this record the adequacy of process would seem clear." (App. at 15.)

The petitioner makes two principal claims regarding the procedures followed by respondents in investigating the question of plagiarism. First, she asserts that in sending out the texts to the two outside experts, preliminary to making any decision whether to even initiate proceedings against petitioner, respondent Freeland was bound by due process to send them her "Refutation" as well. Since what the Dean was looking for was an expert analysis of the texts, divorced from any question of personalities or institutions, sending the "Refutation," which relied in significant part on just such questions, would have defeated the purpose. Moreover, far from showing

that it was "clearly established" that due process required him to send the "Refutation," petitioner has been unable to cite any case at all where an opportunity to "respond," not to the decision-making tribunal, but to potential witnesses in the case, was required before proceedings had even begun. The First Circuit properly recognized that due process did not demand any such thing. (App. at 13-14.)

The second procedural flaw claimed by petitioner is the alleged failure of respondent Freeland to follow the University's "Red Book" personnel procedures. (See Petition at 6-7, 16.) However, as recognized by the Court of Appeals (App. at 21 n. 9), there was no evidence in this case that the "Red Book" procedures applied. Contrary to petitioner's assertion in this Court (Petition at 6) respondent Freeland never "admitted" that the plagiarism inquiry was governed by the "Red Book" or that it was a "major personnel action" as defined in that document. Rather, Freeland analogized the case to a major personnel action for his own guidance in formulating procedures to be followed in an unprecedented matter that was not governed in many respects by existing regulations. (Respondent Freeland's deposition testimony, pp. 431-433 of the record appendix in the Court of Appeals, is reproduced at pp. 11-12 *infra*.) And in terms of the essential feature of the Red Book policy, seeking the advice of appropriate faculty, Freeland did indeed follow analogous procedures. Even, however, if Freeland failed to follow an applicable University policy or regulation, that failure does not by itself amount to a violation of due process. *Board of Curators of Univ. of Mo.* v. *Horowitz*, 435 U.S. 78, 92 n. 8 (1978); see also *Davis* v. *Scherer*, 468 U.S. 183, 193-196 (1984). As the First Circuit held, "on this record the adequacy of process would seem clear." (App. at 15.)

The petitioner also argues that a denial of substantive due process is involved, through what she calls a "litany of unfairnesses." (Petition at 22.) Since she has been unable to specify even a single "unfairness" that would violate due process, it is difficult to understand how this litany is composed. In essence

she simply argues that because the result of the hearing procedure was adverse to her, it must have been unfair. However, the First Circuit properly analyzed the substantive due process questions under pertinent decisions of this Court (see App. at 19-23) and correctly concluded that the respondents' decisions consisted of the exercise of professional academic judgment and were based on substantial evidence. There was no evidence that could support a finding that they were arbitrary or capricious.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY, 1990

ADDENDA

[225] * * *

2. Findings of the Committee.

Plagiarism is defined in the following terms by the *MLA Handbook for Writers of Research Papers, Theses, and Dissertations* (New York: Modern Language Association, 1977; p. 4):

> Plagiarism may take the form of repeating another's sentences as your own, adopting a particularly apt phrase as your own, paraphrasing someone else's argument as your own, or even presenting someone else's line of thinking in the development of a thesis as though it were your own. In short, to plagiarize is to give the impression that you have written or thought something that you have in fact borrowed from another.

Setting aside (as this definition seems to do) issues of context, motive, and extenuating circumstances, the Committee, after careful review of Professor Newman's article/thesis and comparable passages in Professor Setchkareff's book *Die Dichtungen Gundulics und ihr Poetischer Stil* (Bonn, 1952), concludes that Professor Newman's article/thesis is an objective instance of plagiarism. Indeed, every form of plagiarism listed in the above definition appears in Professor Newman's article/thesis.

* * *

[431] * * *

Q. But after they do whatever they've done precipitating their coming to you in December and reporting their belief as then indicated by their entry in the evaluation report that her scholarship entry for that year is marred, at any rate, questionable, let's say, would they then have any further obligation to do anything, they as an ad hoc departmental personnel committee?

A. Well, I think at that point we start to move into a universe where procedures are not well charted. This was the first instance of this type that I have been involved with in my years of deaning at UMass. I think it was — there have been very few such instances, so that I think

[432] * * *

any precedence existed as to how to handle an accusation of this nature?

A. Yes, sure, we talked about that.

Q. And there weren't any, is that right?

A. There weren't any that we could find or recall.

Q. And am I also correct that under the, at least, established — I'll use guidelines only as a communicative word, that various printed regulations of the University I have that there wasn't anything, apparently, that looked to or applied to a situation like this?

A. Well, in my own mind the appropriate analogy, since there was no specific guideline, was to our way of dealing with major personnel actions.

Q. Like a tenure question or something like that?

A. That's right. And I adopted the rule for myself, in the absence of a precise guideline, that I would follow procedures at every step of the way analogous to those that would be appropriate in a major personnel action.

Q. All right. But it was necessary, given [433] the nature of what existed in the way of written guidelines or assistance to you, that you needed to analogize to some other sort of question being raised, right?

A. That's right. Hang on one second.

(Witness consults with counsel.)

A. In March of 1985 we were discussing the fact that the University's academic personnel policy which was established, revised in 1976, referred back to a predecessor personnel policy established in 1964 under which acts of dismissal against faculty members were included in the array of major personnel actions, and that when the 1976 redraft occurred, the 1964 provisions with respect to dismissal were left in force, was one aspect of the 1964 document that was not revised. And so in addition to making the analogy to a major personnel action based on the 1976 policy, that was reinforced by the fact that under the 1964 policy dismissal was considered major personnel action. And since dismissal was a possible extreme end outcome of this procedure, you know, that seemed a relevant consideration for us in thinking about how to handle it.

* * *